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No. 10-31

In the Supreme Court of the United States

ANA BOATWRIGHT, PETITIONER

v.

ELLIOT D. RAY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly applied *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *Lilly* v. *Virginia*, 527 U.S. 116 (1999), to this pre-*Crawford* case, where out of court statements of co-actors were introduced in a criminal trial without an opportunity to cross-examine them—and where those statements were the only evidence placing Ray with a gun at the scene of the crime.

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INTRODUCTION

Petitioner seeks review of the Seventh Circuit's straightforward application of the clearly established law of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and *Lilly* v. *Virginia*, 527 U.S. 116 (1999), to the unique facts of this case.[1] In doing so, Petitioner fails to articulate, much less satisfy, this Court's criteria for certiorari. See Rule 10. First, the petition fails to identify any conflict among the lower courts concerning the question presented. There is none. Second, even if the lower courts could somehow disagree about how to resolve the question presented, it would be of little consequence. *Roberts* and *Lilly* have both been superseded by this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and this case is one of only a handful of pre-*Crawford* cases still pending on collateral review. Thus, far from raising any important or recurring question of law, certiorari would serve only to reexamine a dead doctrine. Third, although Petitioner urges this Court to grant certiorari merely to correct error, that argument would not support certiorari even if it were correct—and it is not. Only by mischaracterizing both the decision below and the record can Petitioner portray the decision as contrary to AEDPA. For example, Petitioner's principal claim—that the ruling below conflicts with *Tennessee* v. *Street*, 471 U.S. 409

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[1] Because Ray's conviction was finalized before this Court decided *Crawford*, Ray's Confrontation Clause claims were properly analyzed "according to *Roberts* and *Lilly*, the clearly established Supreme Court precedent at the time of the state court decisions." *Bintz* v. *Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). See also *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007) (holding that *Crawford* did not apply retroactively).

(1985)—ignores the critical differences between this case and *Street*, as well as the fact that the statements here were not subject to any limiting instruction, as required by that decision.

At its core, therefore, this is an ordinary merits appeal in search of an extraordinary rationale—and that rationale is wrong on the merits. The petition should be denied.

STATEMENT OF THE CASE

The State's petition for certiorari misstates key aspects of the factual and procedural record.[2] The following sections provide the Court with critical information that the State omitted from its petition.

A. The dearth of evidence against Ray

Ray was one of several people charged and convicted of participating in a March 25, 2000, retaliatory shoot-out on North 29th Street in Milwaukee, Wisconsin. Pet. App. A30-38. Ray was charged with being a member of the conspiracy that led to the shooting, which injured Tenifa Jones and Jermaine Savage, and resulted in the death of Rita Martinez. *Ibid.*

The principal issue at trial was whether Ray had withdrawn from the conspiracy, or whether he was on 29th Street at the time of the shooting. Ray admitted to (1) being at a house on 33rd Street, where everyone discussed whether to go down to 29th Street to find the men who had previously shot at them; (2) picking

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[2] The complete trial transcript in this case was submitted to the Seventh Circuit Court of Appeals pursuant to a consent motion, and the Seventh Circuit took judicial notice of the transcript. See Dkts. 25 and 28.

up a gun; and (3) leaving with a group of people who were heading to 29th Street. Dkt. 25 at SA-698-719. But Ray also consistently maintained that he withdrew from the conspiracy before reaching the location of the shooting. *Ibid.* Upon changing his mind, he withdrew by telling his friends that he was not going with them—and turning around and returning to the house on 33rd Street. *Ibid.*

The prosecution had no physical evidence or eyewitness testimony placing Ray on 29th Street. Although the police obtained extensive physical evidence about the shooting, none of the guns used in the shooting was ever recovered—let alone linked to Ray. Dkt. 25 at SA-142, SA-835, SA-888, SA-894, SA-903.

Nor did the prosecution have any witnesses who "could place Ray at the scene of the shootings," much less "with a weapon in his hand." Pet. App. A7; see also Dkt. 25 at SA-902. The prosecution presented three witnesses who supposedly could testify about what happened on the night in question, but none of the three witnesses actually went to 29th Street. Furthermore, at trial, all three witnesses recanted key parts of their prior statements to police. Dkt. 25 at SA-209-246, SA-367-387, SA-493-494, SA-498.

B. The out-of-court statements of co-actors placing Ray at the scene of the crime

The State had only one piece of evidence placing Ray at the scene of the crime: the out-of-court statements of his co-actors, which were the product of custodial interviews with the police. But those co-actors, Myles and Townsend, were not called to testify. Instead, their out-of-court statements were relayed through the testimony of Detective Phillips,

who described reading them to Ray during police questioning.

According to Detective Phillips' testimony, "*Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.*" Pet. App. A14-15, Dkt. 25 at SA-653 (emphasis added). First, he was "*confronted with statements*" by Myles that "*Ray was shooting a nine-millimeter on 29th Street.*" *Ibid.* And second, he was confronted with statements by Townsend, placing Ray on 29th street with "*a .45-caliber pistol.*" *Ibid.*

These out-of-court statements of Ray's co-actors were the only testimony placing Ray at the scene of the crime.

C. The State's use of co-actors' out-of-court statements at trial

With no direct evidence, the prosecution built its case on circumstantial evidence, detailing who was involved in the initial conspiracy and presenting facts about the victims.

The prosecution also staked its case on Myles' and Townsend's statements. The State presented the jury with extensive information about Myles and Townsend. The jury was told what each looked like, what their nicknames were, how they fit into the conspiracy, and which guns they picked up from the house on 33rd Street. Dkt. 25 at SA-142, SA-345.

But neither of them was called to testify. Instead, after establishing that Myles and Townsend were central players in the shooting, the State proceeded to introduce their out-of-court statements,

placing Ray on 29th Street with them, and with a gun.

As noted, the prosecutors introduced these statements through the testimony of Detective Phillips. And although they purported to introduce the statements only to show Ray's reaction to them, they did not merely explain that Ray had been confronted with statements. Instead, they introduced the statements verbatim—as established fact. Dkt. 25 at SA-653. Nor was the jury even given a limiting instruction directing it not to use Myles' and Townsend's statements as fact.

In its closing argument, the State returned to its best evidence: the statements of Myles and Townsend. See, *e.g.*, Dkt. 25 at SA-866 ("[T]hey tell him that Miriam Miles [sic] says you're out there with a 9 [millimeter], Sylvester Townsend says you had a .45[.]"); *Id.* at SA-868 ("Hey, there's other guys here who are saying you were present on North 29th Street shooting"). The prosecutor repeatedly reminded the jury that Ray was *confronted* by Myles' and Townsend's statements. See, *e.g.*, Dkt. 25 at SA-869 ("[The police] *confront* him with Black's statement, Miriam Miles' and Slick's statements about having guns"); *Id.* at SA-901 ("[Ray is] *confronted* ... [Detective Phillips] said that people said you're out there shooting, said ... they get more specific, when the police *confront* him with a little more information about what happened.").

Thus, although the prosecutor went on to mention Ray's reaction, the jury was told that two named co-actors who never testified placed Ray on 29th Street with them, shooting a gun.

D. Proceedings below

On direct appeal to the Wisconsin Court of Appeals, Ray argued that the trial court improperly allowed into evidence statements by non-testifying co-actors, obtained during custodial interrogations, that provided the only direct evidence that he was at the scene of the crime and firing a gun. Citing *Lee* v. *Illinois*, 476 U.S. 530, 539-46 (1986), the court acknowledged that "[a] defendant's constitutional right to confrontation may be violated if a co-actor's confession is admitted at trial as substantive evidence of the defendant's guilt, the co-actor does not testify at trial, and the co-actor's confession is not sufficiently reliable to warrant its uncross-examined admission into evidence against the defendant." Pet. App. A33. But the court declined to apply the holding of *Lee* to reverse. Instead, the state appeals court referred to *Tennessee* v. *Street*, 471 U.S. 409 (1985), which held that a co-conspirator's confessions may in some circumstances be admitted, provided they are not introduced as substantive evidence and are subject to a limiting instruction. But the state appeals court did not explain why the holding of *Street* applied here. Instead, the court simply asserted that "[c]learly" the statements "were not hearsay" because they were offered "to show Ray's reaction to *his co-actor's statements placing him at the scene, shooting a gun.*" Pet. App. A33-35 (emphasis added).

After the Wisconsin Supreme Court denied review, Ray filed a federal habeas petition. And the district court certified to the Seventh Circuit the question whether "the trial court's admission of the statements by non-testifying co-actors through the

testimony of the detective ran afoul of the confrontation clause." Pet. App. A4.

In a thorough opinion applying the AEDPA standard, the Seventh Circuit found that the state court's conclusion that the co-actors' statements were introduced merely "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun" was an unreasonable application of clearly established federal law.[3] Pet. App. A6-8. After a close review of the record, the court emphasized that there were no witnesses who "could place Ray at the scene of the shootings, with a weapon in his hand." *Id.* at A7. The Seventh Circuit also found that "the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross examination, accusing Ray of the very crimes with which he stood charged." *Ibid.* The court found it implausible to believe that the statements were not offered for this purpose. Accordingly, the introduction of the evidence "was a clear violation of Ray's constitutional right of confrontation." *Ibid.*

The Seventh Circuit then applied this Court's settled decisions in *Ohio* v. *Roberts* and *Lilly* v. *Virginia*, which established that statements of non-testifying witnesses against an accused may be admitted without cross-examination only if the evidence "falls within a firmly rooted hearsay exception" or if it contains "particular guarantees of

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[3] The Seventh Circuit panel issued a unanimous opinion granting Ray habeas relief. Subsequently, the Seventh Circuit denied the State's petition for rehearing and rehearing *en banc*, and the panel issued an amended opinion. Where we refer to the panel's opinion in this brief, references are to the amended opinion.

trustworthiness." Pet. App. A8-10; see *Roberts*, 448 U.S. at 65-66 (1980); see also *Lilly*, 527 U.S. at 124-125 (1999). The court found that the co-actors' statements did not fall within a hearsay exception, or contain particularized guarantees of trustworthiness. Pet. App. A9. Indeed, the government did not argue to the contrary. Accordingly, the court found that admission of the co-actors' statements was a clear violation of *Roberts* and *Lilly*. *Id.* at A8-10.

Finally, the Seventh Circuit applied the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993), and found that the error in admitting the co-actors' statements was not harmless because "Ray was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy." Pet. App. A10. As the court concluded, the "confrontation clause violation seriously affected the fairness of the judicial proceedings."[4] *Ibid.*

REASONS FOR DENYING THE PETITION

I. Because The Seventh Circuit's Decision Accords With Decisions Of Other Circuits, Petitioner Does Not Even Attempt to Identify A Circuit Split.

At the outset, it merits emphasis that the State does not even attempt to allege a conflict between the

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[4] Although the State raised a procedural default argument for the first time in its petition for rehearing and rehearing *en banc*, the State's petition to this Court does not dispute that Ray's Confrontation Clause claim was preserved and was properly before the Seventh Circuit. *See* Pet. App. A10.

Seventh Circuit's decision and that of any other circuit or state court. That is unsurprising, as we are aware of no decisions declining habeas relief in situations similar to this case.

To the contrary, the Seventh Circuit is in accord with many other circuits that have granted habeas relief in similar circumstances. Indeed, several circuits have specifically applied *Roberts* and *Lilly* in reversing lower-court rulings that similar out-of-court statements were not hearsay, and in holding that the introduction of such statements violated clearly established law. See, *e.g.*, *Ryan* v. *Miller*, 303 F.3d 231, 247 (2d Cir. 2002) ("Thus, accusatory assertions introduced without the testimony of the accuser not only violate the Confrontation Clause, but they also violate rules against hearsay."); *Jones* v. *Cain*, 600 F.3d 527, 536 (5th Cir. 2010) ("The State argues that Artberry's recorded statements were properly admitted as non-hearsay pursuant to Louisiana Code of Evidence. ... The district court correctly found all the elements of a Confrontation Clause violation under the applicable *Ohio* v. *Roberts* standard."); *Stallings* v. *Bobby*, 464 F.3d 576, 578-81 (6th Cir. 2006) ("Stallings contended that a hearsay statement by Alexander Quarterman, an acquaintance of Stallings, accusing Stallings of illegal possession of drugs and firearms was introduced at trial in violation of the Supreme Court's holding in *Lilly* v. *Virginia*. ... We agree and, therefore, find it necessary to reverse the district court's denial of relief."); *United States* v. *Chapman*, 345 F.3d 630, 632-35 (8th Cir. 2003) ("Mr. Chapman asserts that Mr. Barron's statements to Agent Scheer were inadmissible hearsay, and that their admission violated his rights under the confrontation clause of the sixth

amendment. We agree with both of these contentions ... [W]e believe the result in *Lilly* bars the admission of Mr. Barron's statements against Mr. Chapman on confrontation-clause grounds."); *Stevens* v. *Ortiz*, 465 F.3d 1229, 1231 (10th Cir. 2006) (Applying *Lilly* and holding that "the reasoning of the Colorado Supreme Court was contrary to clearly established federal law, and the introduction of the accomplice confession violated Mr. Stevens's rights under the Confrontation Clause."); *Brown* v. *Dugger*, 831 F.2d 1547, 1552 (11th Cir. 1987) (holding that the statement of an alleged accomplice introduced through a police officer's testimony was hearsay and "constituted a constitutional violation of petitioner's right to confrontation" under *Roberts*).

In all of these cases, the circuit courts reviewed the record and applied the clearly established law of *Roberts* and *Lilly* to the particular facts of each case. In each case, the substantive impact of the statements from non-testifying witnesses or co-actors was apparent from the record. And in each case, the use of those statements amounted to a Confrontation Clause violation. This was true, moreover, even where the government purported to offer the statements for other, albeit implausible, purposes. The Seventh Circuit's decision followed the same approach and reached the same conclusion based on an application of *Roberts* and *Lilly* to the particular facts of this case. There is no conflict for this Court to resolve.

II. This Case Arises From A Dead Doctrine, And Thus Presents No Question of Ongoing Significance

As we have shown, the lower courts are in agreement over both the basic legal framework that governs this case and its application to similar facts. But even if the lower courts *were* divided over the application of cases such as *Roberts* and *Lilly*, certiorari would not be warranted. Those cases were superseded by this Court's 2004 decision in *Crawford*. Thus, the decision below is part of a small (and shrinking) class of habeas cases arising under the pre-2004 standard, and the question presented is not sufficiently recurring to warrant review.

In *Crawford*, this Court overruled the reliability test of *Roberts* and held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination." *Crawford*, 541 U.S. at 68. Under the rule of *Crawford*, co-conspirator statements such as those allegedly made by Myles and Townsend to police are clearly testimonial, and their admission without cross-examination would violate the Sixth Amendment right to confrontation.

Ray's conviction, however, was finalized less than six months before *Crawford* was decided, requiring that it be analyzed under pre-*Crawford* law. That law is the law of *Roberts* and *Lilly*. See *Bintz* v. *Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005); see also *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007).

As a result, this case is *sui generis*. It is one of a handful of collateral review cases that are still subject to the *Roberts* regime. Because all new

habeas cases are reviewed under *Crawford*, this case implicates a dead area of law. Therefore, even if this case presented the Court with a compelling reason for certiorari, which it does not, any decision would have an extraordinarily limited impact. Moreover, because this case comes to the Court on habeas review, it is a poor vehicle for developing the Court's Confrontation Clause jurisprudence.

III. The Seventh Circuit Properly Applied Clearly Established Law To The Particular Facts Of This Case

As we have explained, this case raises no circuit split and presents this Court with no issues of lasting or recurring significance. That is reason enough to deny certiorari. But even if this Court were to consider certiorari purely for error-correction, there would be no basis to grant certiorari. Even under the highly deferential standard applied in AEDPA cases, this was not a hard case.

Under pre-*Crawford* doctrine, the law applicable to Ray's Confrontation Clause claim is clearly established and undisputed. To be sure, the State is correct that "*Street* is the applicable Supreme Court case on Confrontation Clause claims pertaining to co-actors' extrajudicial statements that *are not hearsay*." Dkt. 39 at 7 (emphasis added). But extrajudicial statements that *are* hearsay are governed by *Roberts* and *Lilly*. See *Roberts*, 448 U.S. at 66; *Lilly*, 527 U.S. at 134-37. The state does not dispute that this is the clearly established standard for hearsay. And under the *Roberts* and *Lilly* standard, where extrajudicial hearsay statements are used against a defendant, he is "denied his constitutional right of confrontation." *Bruton* v. *United States*, 391 U.S. 123, 127-28 (1968);

see also *Roberts*, 448 U.S. at 66 (permitting only those hearsay statements that fall within a firmly-rooted hearsay exception or contain particular guarantees of trustworthiness).

Indeed, the constitutional violation is all the more egregious—and the law all the more clearly established—where prosecutors use statements of a defendant's co-actors. As this Court explained in *Lilly*, out-of-court co-actor confessions are "presumptively unreliable" because it is "highly unlikely" that "confessions that shift or spread blame can be effectively rebutted" without cross-examination. *Lilly*, 27 U.S. at 137. After all, "the government is involved in the statements' production," and the statements "describe past events" that "have not been subjected to adversarial testing." *Ibid.* In these circumstances—the circumstances of this case—this Court has warned that the Confrontation Clause's truth-finding function is "uniquely threatened." *Lee*, 476 U.S. at 541. The Court has had no hesitation in holding that such statements are constitutional violations. See *ibid.* (holding that introduction of accomplice's confession violated Confrontation Clause); *Bruton*, 391 U.S. at 127-28 (same); *Lilly*, 27 U.S. at 137 (same).

In light of the clearly established law, the key question for the Seventh Circuit was whether the co-actor statements of Myles and Townsend were hearsay—*i.e.*, whether they were out-of-court statements establishing that Ray was at the scene of the crime. And as we explain below, the Seventh Circuit properly found that even under the most deferential standard of review for AEDPA decisions, the statements of Myles and Townsend were hearsay

and functioned as substantive evidence against Ray. In the context of the evidence presented in this case, no other conclusion is plausible. But again, even if the court of appeals had erred in this regard, certiorari would not be warranted to address the question of whether the particular statements at issue qualified as hearsay. The law governing that question is well-settled.

A. The Seventh Circuit's decision was compelled by the clearly established law of *Roberts* and *Lilly*.

The State's entire case depended on the statements of Miriam Myles and Sylvester Townsend. Because Myles' and Townsend's statements were hearsay, the Seventh Circuit properly applied the clearly established law of *Roberts* and *Lilly* to the facts of this case, finding that admission of those out-of-court statements violated the Confrontation Clause.

1. Myles' and Townsend's out-of-court statements had an obvious hearsay purpose.

The Seventh Circuit was right to conclude that the introduction of Myles' and Townsend's statements to the jury had an obvious hearsay purpose.

The main issue at Ray's trial was whether he was at the scene of the crime on 29th Street when the shooting occurred. Ray consistently testified that he withdrew from the conspiracy at issue and was not at the scene of the crime. Dkt. 25 at SA-698-719. As noted above, moreover, no physical evidence placed Ray at 29th Street, and no witnesses "could place Ray at the scene of the shootings, with a weapon in his hand." Pet. App. A7.

As a result, the only evidence placing Ray at the scene of the crime was the statements of Ray's two co-actors. Both statements were read to the jury by Detective Phillips as part of the State's case-in-chief. Detective Phillips testified that "Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray." Dkt. 25 at SA-41-42, SA-653. Shortly thereafter, the jury heard that Ray was confronted with statements by Myles "that *Ray was shooting a nine-millimeter on 29th Street*" and by Townsend "that *Ray had a .45-caliber pistol.*" *Ibid.* (emphasis added).

Later at closing, the prosecutor returned to the statements of Myles and Townsend, telling the jury that "Miriam Miles [sic] says you're out there with a 9, Sylvester Townsend says you had a .45." Dkt. 25 at SA-866, SA-869. These references to Myles' and Townsend's statements during closing treated Myles and Townsend as if they were witnesses and reminded the jury that two named co-actors had placed him at the scene of the crime. In light of the record, it is obvious that Myles' and Townsend's statements established a vital "missing link" in the prosecution's case: placing Ray at the scene of the crime. And for that purpose, the out-of-court statements were plainly hearsay.

2. *Roberts* and *Lilly* require exclusion of the statements.

Myles' and Townsend's statements are exactly the types of statements that *Roberts* and *Lilly* prohibit. Both statements were produced while in police custody, described previous events, and were not subject to any cross-examination at trial. The

Seventh Circuit found that because the statements by Myles and Townsend did not "fall within a firmly rooted hearsay exception" and also did not contain "particularized guarantees of trustworthiness," they were inadmissible. Pet. App. A8-A9 (citing to *Roberts*, 448 U.S. at 65-66; *Lilly*, 527 U.S. at 124-25).

In addition, both statements implicate Ray in the shooting. Yet, as the Court warned in *Lilly*, "accomplices' confessions that shift or spread blame" trigger "core concerns" when they "have not been subjected to adversarial testing." *Lilly*, 527 U.S. at 137.

As the Seventh Circuit put it, "Ray was not able to cross examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy at issue."[5] *Ibid.* This was a clear violation of *Roberts* and *Lilly*.

B. The Seventh Circuit properly found that it was unreasonable under AEDPA to apply *Street* instead of *Roberts* and *Lilly*.

Although *Roberts* and *Lilly* plainly prohibit introduction of co-actor hearsay as substantive evidence, the petition rests on the proposition that there was no Confrontation Clause violation because "Ray's claim was similar to the claim presented to this court in *Tennessee* v. *Street*, 471 U.S. 409 (1985)." Pet. 11. But in fact, it is not similar at all.

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[5] For the same reason, the Seventh Circuit properly held that admitting Myles' and Townsend's statements was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. A10.

The premise of the State's argument—that the out-of-court statements of Ray's co-actors were not hearsay—cannot reasonably survive scrutiny. And the conclusion that *Street* controls is equally unsound. In these circumstances, it was wholly appropriate under AEDPA for the Seventh Circuit to hold that the state court had unreasonably applied *Street*.

1. The Seventh Circuit rightly found it unreasonable to believe that the out-of-court statements were not hearsay.

Ignoring the record, the State's petition simply repeats the assertion that Myles' and Townsend's statements placing Ray at the scene of the crime were actually introduced to show Ray's "reaction" to being implicated in the shooting. Pet. 10. Specifically, the State cites to Ray's statement at the end of the interview, "[T]ell me which gun killed the girl and I'll tell you everything." *Ibid.* But the Seventh Circuit, upon review of the record, correctly determined that proof of Ray's *reaction* did not require admitting the *co-actor confessions* that preceded them. Even if Ray's reaction was probative and admissible, the reason for admitting the reaction did not supply a plausible—much less, persuasive—non-hearsay reason for admitting the confessions. Although admitting these out-of-court statements was the only way for prosecutors to place Ray at the scene of the crime, it was *not* necessary to accomplish their purported non-hearsay purpose. The State's argument for admitting these statements was no more than a transparent pretext.

If the State's purpose in introducing the statements was to suggest that Ray's reaction at the

end of his interview revealed that he was really on 29th Street, all it needed to do was introduce the part of the statement that showed Ray's reaction. That portion of Ray's statement was completely severable from the co-actor statements at issue in this case. Indeed, at oral argument the Seventh Circuit asked the State to explain why the statements could not be severed, but the State had no answer. And after three rounds of briefing, the State has never explained why Ray's reaction could not have simply been shown by sharing the final statement "tell me which gun killed the girl and I'll tell you everything" with the jury. Pet. App. A3. And as this Court has long held, "[w]here viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." See *Bruton*, 391 U.S. at 134.

Prosecutors easily could have asked Detective Phillips about Ray's offer of help at the end of his interview without mentioning to the jury that two of Ray's co-conspirators, who had been named and identified earlier in the trial, actually placed Ray at the scene of the crime with a weapon. But the State did not do that. Instead it relied on Detective Phillips to introduce verbatim the critical statements of Myles and Townsend to the jury; and as the record shows, that evidence placing Ray at the scene of the crime was not available from any other source.

The State also claims that Myles' and Townsend's statements were not introduced for their truth because they are "inconsistent with one another." Pet. 11. According to the State, because Myles placed Ray on 29th Street with a 9mm and Townsend placed him on 29th Street with a .45, the jury would simply ignore both statements as untrue. The jury, in the

State's view, would have known on its own—without being instructed—that the statements were not being used to establish the truth of the matter asserted.[6] This argument fails to withstand scrutiny.

As noted earlier, Ray was charged with being part of a conspiracy. Accordingly, the only thing the prosecutor had to prove was that Ray was present at the scene of the crime on 29th Street. It did not matter which gun Ray was carrying, or even if he had a gun, because the police never recovered any of the guns that were involved in the shooting. On the only point that mattered for conviction, the statements were consistent: They both unequivocally placed Ray on 29th Street, the scene of the crime. And those two statements were the only evidence establishing that critical fact.

The jury may well have believed that Myles and Townsend saw Ray at the scene of the crime, even if they did not see him well enough to correctly identify the gun he was carrying. But Ray was not given any

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[6] Remarkably, the State was not even sure at oral argument whether the out-of-court statements are accurate, or whether they were instead manufactured by the officer who used them to confront Ray. See Oral Argument Audio Recording, available at: http://www.ca7.uscourts.gov/tmp/-1V192RDR.mp3 ("Well, first of all, I'm not even sure that those statements were made. I mean, for all I know, Detective Phillips was using this as some sort of police interrogation technique."). If they were in fact manufactured by the officer, prosecutors could have brought out at trial that they were *false*. But prosecutors did not do so, and instead allowed the jury to draw the conclusion that the statements had actually been made.

opportunity to cross-examine them about these inconsistencies.

Under these circumstances, Myles' and Townsend's statements could not plausibly be thought to prove only Ray's reaction. They were not even needed to prove his reaction. And in light of the critical void in the prosecution's case conveniently filled by these statements, they had an obvious hearsay purpose. As the Seventh Circuit noted, "to accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases the confrontation right enjoyed by the accused." Pet. App. A7.[7]

2. The statements in this case were nothing like those for which this Court made an exception in *Street*.

On the mistaken assumption that the prosecutors had a valid nonhearsay purpose for introducing the statements at issue, the State claims that the court of appeals should have applied *Street*. But that argument lacks merit.

In *Street*, this Court acknowledged the general rule of *Roberts* and *Lilly* but held that out-of-court statements do not raise Confrontation Clause

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[7] The State's position appears to be that any claimed nonhearsay purpose, however implausible, suffices to make an out-of-court statement admissible simply because prosecutors assert it. But the law has never permitted such an approach to hearsay. The State's position would immunize constitutional error from review, by allowing the limited exception of *Street* to eviscerate the protection of the Confrontation Clause.

concerns if—and only if—they are not substantive evidence proving the truth of the matter asserted (*i.e.*, if they are not hearsay). *Street*, 471 U.S. at 414. Thus, the Court explained, the "nonhearsay aspect of Peele's confession—*not to prove what happened at the murder scene* but to prove what happened when respondent confessed—raises no Confrontation Clause concerns." *Ibid.*

There was no plausible reason in *Street* to believe that the out-of-court statements were substantive evidence of what happened at the murder scene. The issue at trial was whether the defendant's own confession had been coerced, and that issue depended on whether he had been pressured to repeat the confession of his co-actor, Peele. 471 U.S. at 414. The defendant, moreover, opened the door to discussion of his co-actor's confession by testifying that police "read from Peele's statement and directed him to say the same thing." *Id.* at 411. In these circumstances, it was obvious that the relevance of the co-actor confession was to rebut the *defendant's testimony about the contents of that very confession* by showing that it did not contain "the same thing" as the defendant's confession.

For that reason, this Court found the situation in *Street* to be "significantly different" from cases such as *Roberts*. *Id.* at 413. And for the same reason, it is significantly different from this case. Here, Ray did not testify at all about the content of Myles' and Townsend's confessions. Rather, the issue at trial—indeed, the critical void in the prosecution's case—was what happened at the murder scene. And Myles' and Townsend's statements were offered not in response to a claim of coercion, but as part of the State's case-in-chief. Pet. App. A7. While there was

every reason in *Street* to believe that the statement at issue was not used "to prove what happened at the murder scene" (*id.* at 414), here there is every reason to believe the opposite.

Not only does *Street*'s exception to the general rule of *Roberts* and *Lilly* not apply here, but the trial court in this case did not even satisfy what the Court in *Street* considered to be a necessary prerequisite for such an exception—a limiting instruction to the jury. As the Court there explained, "[i]f the jury had been asked to infer that Peele's confession proved that respondent participated in the murder, then the evidence would have been hearsay." *Id.* at 414. But there was no concern about such an inference in *Street*, because the jury was twice "pointedly instructed" that it was "'not to consider the truthfulness of [Peele's] statement in any way whatsoever.'" *Id.* at 414-15 (quoting instruction). Thus, the question before the Court in *Street* was "reduced to whether" jurors could be trusted to "follow[] the instructions given them by the trial judge." *Id.* at 415 (quotations omitted). The Court concluded that they could be trusted. Here, by contrast, the trial judge did not give the jury any curative instruction.[8] Pet. App. A8. Therefore, the question is whether, in the absence of an instruction, a co-actor statement about what happened at the

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[8] Although the State attempts to suggest that Ray's trial counsel did not properly object to admission of the confessions, the state court reached the merits of Ray's Confrontation Clause claim and the State failed to make any procedural default argument on appeal. The Seventh Circuit thus properly deemed the argument waived. Pet. App. at A10; see *Lilly v. Gilmore*, 988 F.2d 783, 784-85 (7th Cir. 1993).

scene of the crime is allowed. Under *Roberts* and *Lilly*, it is not.

3. AEDPA did not require the Seventh Circuit to apply *Street* where it was unreasonable to do so.

In light of the foregoing, it is not surprising that the Seventh Circuit would find this case to be nothing like *Street* and instead to involve a straightforward application of *Roberts* and *Lilly*. Pet. App. at A7. Nor is there any question, under AEDPA, that the state court acted unreasonably in concluding otherwise. As this Court noted in *Panetti v. Quarterman*, a federal court is permitted to find an application of a legal principle "unreasonable" under AEDPA when the case before it involves a set of facts "different from those of the case in which the principle was announced." 551 U.S. 930, 953 (2007) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). The Seventh Circuit did no more than that here.

In response to the decision below, the State claims that the inapplicability of *Street* is somehow not clearly established. Pet. 14. But *Street* is the exception; *Roberts* and *Lilly* are the rule; and the clearly established rule of *Roberts* and *Lilly* obviously applies where the exception does not. By ignoring the absence of any limiting instruction, among other factors, the State's petition in fact attempts to carve out a wider exception to *Roberts* and *Lilly* than *Street* actually created.

AEDPA "recognizes . . . that even a general standard may be applied in an unreasonable manner," meriting issuance of the writ. *Panetti*, 551 U.S. at 953. Far from announcing some "general standard," this Court in *Street* made a narrow

exception to the rule of *Roberts* and *Lilly*. AEDPA does not permit states to read that narrow exception generally, and then unreasonably apply it.

CONCLUSION

In sum, the petition satisfies none of the traditional criteria for certiorari. The decision below does not present any unresolved issue of law, and the petition does not demonstrate any conflict of authority among the lower courts, or with any decision of this Court. Indeed, the petition does nothing more than quibble with the application of settled law to the particular facts of this case.

The petition should be denied.

Respectfully submitted.

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